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In The

# Supreme Court of the United States

JON HUSTED, Ohio Secretary of State,

*Petitioner,*

v.

A. PHILIP RANDOLPH INSTITUTE, et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## *AMICI CURIAE* BRIEF FOR THE LIBERTARIAN PARTY OF OHIO AND THE CENTER FOR COMPETITIVE DEMOCRACY IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

1. The Libertarian Party of Ohio (LPO) is a political membership organization in Ohio that has enjoyed status as a political party under Ohio law intermittently since 1972. LPO was a fully recognized political party from 2008 through the 2014 general election, when it was stripped of its status as a recognized political party. During the span of this four-election period, which included two presidential elections, LPO clearly emerged as the third most popular political party in Ohio. Over the course of its existence, LPO repeatedly (and unconstitutionally) has been denied ballot access by Ohio officials. *See Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 387-88 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 651 (2017). LPO continues to be a local affiliate of the national Libertarian Party and continues its fight to be restored to Ohio's electoral ballot. *See Libertarian Party of Ohio v. Ohio Secretary of State*, No. 16APE-07-496 (Ohio App. 2017) (pending).

2. The Center for Competitive Democracy ("the Center") was founded in Washington, D.C. in 2005 to strengthen American democracy by increasing electoral competition. The Center works to identify and eliminate barriers to political participation and to secure free, open and competitive elections by fostering

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[1] Pursuant to Rule 37.6, counsel for *Amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *Amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Respondents and Petitioner have both filed global consents to *Amici* filings.

active civic engagement in the political process. The Center has participated in numerous cases involving electoral barriers across the country as either *Amicus Curiae* or through direct representation. *See, e.g., Constitution Party of Pa. v. Cortes*, 116 F.Supp.3d 486 (E.D. Pa. 2015) (holding Pennsylvania's statutory scheme for minor parties and independent candidates unconstitutional), *aff'd*, 824 F.3d 386 (3d Cir. 2016).

## STATEMENT OF FACTS

Ohio, like most states, purges voter registrations that are incorrect or out-of-date. Ohio's principal method for doing so is its statutory "NCOA Process," which compares registered voters' names and addresses with the names and addresses of those who have filed changes with the post office. An apparent change "triggers" a confirmation letter from Ohio's Secretary of State, which if not responded to and followed by voter inactivity results in removal from Ohio's voter registration rolls.

Ohio's Secretary of State has supplemented the NCOA Process with an additional trigger; those who choose not to vote are also selected for confirmation letters. Should they then not respond to the confirmation letter and not vote in one of the next two general elections they are (like those who had changed addresses) removed from Ohio's voter registration rolls.

The Sixth Circuit below correctly ruled that the Secretary's supplemental process, which uses voter

inactivity as its trigger, violates the National Voter Registration Act (NVRA) and Help America Vote Act (HAVA). *A. Philip Randolph Institute v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016). This Court granted certiorari to consider whether federal law "permit[s] Ohio's list maintenance process, which uses a registered voter's voter inactivity as a reason to send a confirmation notice to that voter under the NVRA and HAVA?"

## SUMMARY OF ARGUMENT

Like many states, Ohio has engineered its laws and practices to protect its two-party system. Ballot access laws make it extremely costly and difficult for minor political parties and minor candidates to win space on Ohio's ballots. Because of Ohio's restrictive access laws and mechanisms, even minor parties in Ohio that are capable of achieving ballot access are often stripped of their status. They must begin the whole process anew. This is precisely what has happened to the LPO.

When minor parties and their candidates are removed from ballots, their supporters do not simply turn their allegiance to the major parties. Instead, they frequently stay home. They choose not to vote. Data both nationally and in Ohio support this fact. Ballots without minor candidates experience lower voter turnouts, especially when the excluded political parties and candidates are the third most popular in the state (as is true of the LPO). This is because supporters of those

alternative political parties do not vote. Consequently, Ohio's use of non-voting to trigger removal of voters from its ballots not only infringes the constitutional right not to vote, it effectively discriminates against disaffected voters, including those who support alternative political parties.

## ARGUMENT

Ohio's two major parties have routinely prevented minor parties and minor candidates from gaining ballot access. *See Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 387-88 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 651 (2017) ("As our Circuit explained in a related opinion, 'the LPO has struggled to become and remain a ballot-qualified party in Ohio through frequent litigation.' Throughout this struggle, '[t]he LPO has successfully challenged Ohio laws burdening its access to the ballot,' including a significant victory in 2006.") (quoting *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 405 (6th Cir. 2014) and citing *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006)). Most recently in Ohio, the Republican Party spent several hundred thousand dollars to remove the LPO's gubernatorial candidate, Charlie Earl, from the 2014 ballot. *See Earl v. Ohio Elections Commission*, 2016 WL 5637037 *3 (Ohio Ct. App. 2016). Ohio's and its Republican Party's most recent action, moreover, insured that LPO candidates would not appear on future Ohio ballots. *See Libertarian Party of Ohio v. Husted*, 751 F.3d at 410. Gary Johnson, for example, was forced to

run as an independent candidate in Ohio for President in 2016 and still won 3% of the total vote. Had LPO not been removed from the ballot by Petitioner following the 2014 election, Johnson's success would have maintained LPO's status as a qualified political party for four more years. *See State ex rel. Fockler v. Husted*, ___ N.E.3d ___, 2017 WL 371469 (Ohio 2017).

The two major parties have succeeded in suppressing the emergence of minor parties in two important ways in Ohio and across the United States. First, through their control of legislative and executive processes, they have passed restrictive access laws that make it virtually impossible for minor parties to survive and thrive on America's ballots. *See, e.g., Libertarian Party of Ohio v. Blackwell*, 462 F.3d at 598 ("Ohio is among the most restrictive, if not the most restrictive, state in granting minor parties access to the ballot."). Next, even when minor parties and candidates meet local requirements, they are frequently sabotaged by the major parties' selective enforcement of trivial rules. *See, e.g., Libertarian Party of Ohio v. Husted*, 751 F.3d at 406 (describing several petition requirements in Ohio). The two major parties' enormous financial advantages and official resources make this latter technique especially effective. *See* Mark R. Brown, *Policing Ballot Access: Lessons From Nader's 2004 Run for President*, 35 CAP. U. L. REV. 163, 232 (2006) (Democrats succeeded in removing Nader "because their resources allowed them, without check or balance, to dissect every technical requirement of Ohio law.").

The Libertarian Party of Ohio fell victim to both techniques. The Republican Party spent several hundred thousand dollars to remove LPO's candidates from the ballot, and Ohio's (Republican) legislature passed a new law that made it virtually impossible for the Libertarian Party to re-qualify in time for the 2016 presidential election.

Manipulating ballots is not limited to the Republican Party, nor is it confined to Ohio. Democrats do it, too, in lots of states. The Democratic Party, for example, succeeded in removing Ralph Nader from Ohio's presidential ballot in 2004, as well as the presidential ballots in several other states. *See* THERESA AMATO, GRAND ILLUSION: THE MYTH OF VOTER CHOICE IN A TWO-PARTY TYRANNY (2009) (describing the obstacles Democrats threw at Nader in 2004); Brown, *supra*, at 166 ("Democrats engaged in a coordinated campaign to remove Nader's name from state ballots through what can best be described as 'kitchen sink' legal arguments."). They did so in Ohio by invoking Ohio's prohibition on using non-resident circulators, a law that was only invalidated four years later (too late to save Nader's 2004 candidacy). But for the Democrats' challenge under this unconstitutional Ohio law, Nader would have appeared on Ohio's 2004 presidential ballot. *See Nader v. Blackwell*, 545 F.3d 459, 472 (6th Cir. 2008) ("but for Blackwell's decision to apply [Ohio's prohibition on non-resident circulators] and invalidate 1701 of Nader's signatures, Nader would have remained on the ballot.").

Whether practiced by Democrats or Republicans, the common objective pursued by the major parties is to gain an advantage in the voting booth. There is little downside to doing so, and much to gain, making it a frequent practice. For instance, Republicans in Ohio in 2014 believed that Libertarians, without a gubernatorial candidate, would vote for John Kasich. *See* Henry J. Gomez, *Could a conservative third-party challenger cause trouble for Ohio Gov. John Kasich in 2004? Analysis*, CLEVELAND.COM, Sep. 13, 2013 (http://www.cleveland.com/open/index.ssf/2013/09/could_a_conservative_third-par.html#incart_river) ("An election where Tea Party voters stay home or – just as bad for Kasich – show up and cast ballots for a third-party candidate with no chance of winning, could propel [Democrat] FitzGerald to the governor's chair.") (last visited Aug. 17, 2017). Democrats in 2004 felt Nader's supporters would support John Kerry. *See* Brown, *supra*, at 217 ("Democrats feared that Nader would siphon support from John Kerry's campaign.").

Do minor party/minor candidate supporters switch to supporting major party candidates? Do they still turn out to vote after their parties and candidates are wiped from the ballot? Some do. But many do not. Instead, when stripped of their candidates, minor party supporters often simply refrain from voting.

Ballot access expert Richard Winger, after exhaustively analyzing and comparing data from across the United States, has concluded that purging minor candidates from ballots reduces voter turnout. Richard Winger, *Is There a Connection Between California's*

*Recent Low Voter Turnout and the Top-Two System?*, FOX&HOUNDS, Feb. 26, 2015 (http://www.foxandhoundsdaily.com/2015/02/is-there-a-connection-between-californias-recent-low-voter-turnout-and-the-top-two-system/) (last visited Aug. 10, 2017). In particular, "California's turnout went from 45.8% in November 2010, to 30.8% in November 2014" following its adoption of a top-two system that effectively banned minor candidates. *Id.* California, Winger observed, was the only state in 2014 which absolutely prohibited voters from casting votes for any state-wide candidates other than those supported by the two major parties. California, in turn, was "the only state in which the turnout in 2014, as a percentage of the 2010 turnout, was below 70%." *Id.*

A review of Ohio's official election data reveals that Ohio experienced a similar experience by removing the LPO from its top-of-the-ticket ballot during this same time-frame. In 2010, when the LPO ran a gubernatorial candidate (who won 2.39% of the popular vote, the third largest total), 3,956,045 total votes were cast. That translated to 49.22% of registered voters. *See* JON HUSTED, OHIO SECRETARY OF STATE, VOTER TURNOUT: NOV. 2, 2010 (https://www.sos.state.oh.us/elections/election-results-and-data/2010-elections-results/voter-turnout-november-2-2010/) (last visited Aug. 10, 2017). In 2014, without Ohio's third-most-popular party (LPO) being allowed to run its top-of-the-ticket candidate for governor, only 3,149,876 votes were cast (40.65% of registered voters). JON HUSTED, 2014 ELECTION RESULTS: OFFICIAL STATEWIDE RESULTS

(https://www.sos.state.oh.us/elections/election-results-and-data/2014-elections-results/) (last visited Aug. 10, 2017). Consequently, without an LPO candidate for governor in 2014, voter turnout in Ohio dropped dramatically from that found in the previous gubernatorial election conducted in 2010 (when LPO last ran a gubernatorial candidate).

Data collected by Professor Michael McDonald for the United States Election Project (which was relied upon by Winger) confirms this significant drop. Using the number of people who were eligible to vote, as opposed to those who actually registered, Professor McDonald's data indicates that Ohio's vote total for 2010 dropped from 46.2% of eligible voters, *see* UNITED STATES ELECTION PROJECT: 2010 NOVEMBER GENERAL ELECTION TURNOUT RATES (http://www.electproject.org/2010g) (last visited Aug. 10, 2017) to 36.2% in 2014. *See* UNITED STATES ELECTION PROJECT: 2014 NOVEMBER GENERAL ELECTION TURNOUT RATES (http://www.electproject.org/2014g) (last visited Aug. 10, 2017).

Polling before the Libertarian gubernatorial candidate in 2014 (Earl) was removed from the ballot, meanwhile, indicated that Earl was supported by 6% of registered voters in Ohio. *See* Tom Jensen, Memo, Public Policy Polling, "Ohio's Governor's Race Continues to Looks (sic) Like a Toss Up," Dec. 16, 2013 (https://www.dropbox.com/s/ewme4r9vkeo25hf/12.16%20Gov%20LGBT%20Poll%20Result.pdf) (last visited Aug. 10, 2017). The percentage of undecided voters, meanwhile, stood at 16%. *Id.* Overall turnout without a Libertarian candidate for governor on Ohio's ballot

in 2014 dropped approximately 10% from 2010 levels. This suggests that while some of the disaffected eligible voters may have still turned out to vote, more did not.

These drops in voter turnout in California and Ohio reinforce what minor parties have always known; their supporters do not simply turn out and vote for major-party candidates. Instead, supporters of minor parties and minor candidates, when their preferences are excluded or removed from ballots, often stay home. They choose not to vote.

A corollary of the fundamental right to vote is the fundamental right not to vote. Affirmative First Amendment freedoms necessarily carry correlative negative rights. The right to speak includes the right not to speak. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). Similarly, the right to associate implies the right not to associate. *See California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("a corollary of the right to associate is the right not to associate"). The right to vote must include a constitutional right not to vote. And the exercise of such a right plainly cannot be punished. *See Harman v. Forssenius*, 380 U.S. 528, 541 (1965) ("It has long been established that State may not impose a penalty upon those who exercise a right guaranteed by the Constitution.").

Supporters of minor parties and candidates exercise their constitutional right not to vote at a greater rate than those who align themselves with America's political mainstream. This is caused, in part, by the two major parties, which routinely block alternative parties and candidates from participating in America's electoral process. Regardless of why this happens, *Amici Curiae* believe that Ohio's triggering mechanism – singling out those who do not vote – is not politically random nor neutral. Its disproportionate impact falls most heavily on disaffected voters, who disproportionately support minor political parties and candidates. Ohio's approach adds to the many barriers it has placed in the path of alternative parties that seek to change America's troubled political landscape.

## CONCLUSION

The Sixth Circuit's decision should be AFFIRMED.

Respectfully submitted,

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